Supreme Court, U.S.
FILED

No. 061030 JAN 23 2007

OFFICE OF THE CLERK

In the Supreme Court of the United States

BRANDY BRITTON,

Petitioner,

v.

UNIVERSITY OF MARYLAND AT BALTIMORE, COUNTY, et al.

Respondents.

On a Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Fourth Circuit err in reliance on a presumption that in determining discrimination there is a "powerful inference" established by its own prior case of Evans v. Techs. Applications & Serv. Co., 80 F.3d 954, 959 (4th Cir. 1996) (Appendix A, p. 7 App., Fourth Circuit Opinion and Appendix B, p. 22 App., District Court Memorandum) against the finding of discrimination against the same people that hired and promoted the Petitioner?

2. Does this "strong" and "powerful" inference improperly state the law regarding discrimination?

3. Does this "strong" and "powerful" inference undermine the parties' right to a jury trial, and conflict with the role of a jury as set forth in Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000) and St. Mary's Honor Center v. Hicks, 509 U.S. 502, 506 113 S.Ct. 2702 (1993)?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

All parties to the proceeding are individuals, except for the University of Maryland, Baltimore County, which is part of the State of Maryland, University System. The individual parties not named in the caption are the following respondents: Donald F. Norris, the estate of Derek G. Gill, James Vincent and Shirley L. Bigley.

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STATEMENT OF JURISDICTION

The Fourth Circuit issued its opinion on October 25, 2006. This petition for certiorari is timely in that Petitioner has filed it within 90 days of October 25, 2006. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

I. Overview of the Case

The Fourth Circuit affirmed per curiam, the District Court rulings against the Petitioner, and specifically stated that there was a strong and powerful inference against the Petitioner pursuant to Evans v. Techs. Applications & Serv. Co., 80 F.3d 954, 959 (4th Cir. 1996).

II. Background of the Case

In the courts below, the Petitioner, has argued that this case should be decided by a jury for the reasons set forth in the Supreme Court decisions of Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000) and St. Mary's Honor Center v. Hicks, 509 U.S. 502, 506 113 S.Ct. 2702 (1993)

III. Proceedings Below

In deciding for summary judgment, the Fourth Circuit in its opinion and the District Court in its memorandum based their decisions on Evans v. Techs. Applications & Serv. Co., 80 F.3d 954, 959 (4th Cir. 1996).

REASONS FOR GRANTING THE PETITION

Supreme Court Rule 10 identifies considerations used by the Court in deciding whether to exercise its discretion to grant a petition for writ of certiorari. One consideration is that a "United States court of appeals has decided an important question of federal law... that conflicts with relevant decisions of this Court." In addition the Court considers whether the court of appeals decision "has so far departed from the accepted and usual course of judicial proceedings... as to call for an exercise of this Court's supervisory power...."

Both of these considerations are present in this case.

Since this case involves a large Federal (NIDA) grant of over $1.5 million awarded to the Petitioner as the Principal Investigator ("PI") of a three-year longitudinal study regarding drug use and violence against women using test subjects from Baltimore City, Maryland, this

case holds special importance. After the years of investigation of Petitioner concluded, she recovered her right to be a Principal Investigator for NIDA.

In this case, there is evidence of both discrimination and retaliation, as well as evidence from which a jury can disbelieve the justification put forward by the Defendants. In acting on a motion for summary judgment, credibility determination, and the drawing of legitimate inferences from the facts are jury functions, not those of the Court. Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000) and St. Mary's Honor Center v. Hicks, 509 U.S. 502, 506 113 S.Ct. 2702 (1993). Both discrimination and retaliation were at issue in major and significant parts.

Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 120 S.Ct. 2097 (2000), decided that this kind of conduct is relevant to prove the elements of employment discrimination in plaintiff's prima facie case, rejecting such cases as Theard v. Glaxo Inc., 47 F.3d 676 (4th Cir. 1995). Indeed, the falsity of the reasons or justification for the adverse action, and that defendant's explanation is unworthy of credence is probative of intentional discrimination, and may be quite persuasive.

As the Court stated at page 147 (2108) citing St. Mary's Honor Center v. Hicks, 509 U.S. 502, 506, 113 S.Ct. 2742 (1993):

> **The fact finder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus,**

> **rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination.**

Id. at 511, 113 S.Ct. 2742. An important part of the above-selected quote is that it contains "(particularly if disbelief is accompanied by a suspicion of mendacity)". Thus, particularly where the jury finds mendacity (i.e. a purposeful falsehood or lie), plaintiff's prima facie case is proved given all the other evidence, including retaliation. Further, the Supreme Court specifically stated that the issues of credibility are solely for the jury to determine, and the Court may not weigh the evidence. All reasonable inferences are to be drawn in favor of nonmoving party. (p. 150-151):

> **It therefore follows that, in entertaining a motion for judgment as a matter of law, the court should review all of the evidence in the record.**
>
> **In doing so, however, the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence. "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." (citations omitted).**

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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January 2007

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 03-1650

[Filed October 25, 2006]

BRANDY BRITTON,
Plaintiff-Appellant,

v.

UNIVERSITY OF MARYLAND AT BALTIMORE, COUNTY, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Benson Everett Legg, Chief District Judge. (CA-99-588-L)

Before WIDENER, WILLIAMS, and KING, Circuit Judges.

Affirmed by unpublished per curiam opinion.

PER CURIAM:

Dr. Brandy Britton appeals the district court's grant of summary judgment to the University of Maryland Baltimore County (UMBC), Shirley Bigley, the Estate of

Derek Gill, Donald Norris, and James Vincent. Finding no error, we affirm.

I.

On June 24, 1994, Dr Britton accepted an offer as an assistant professor in the sociology department at UMBC. Throughout Dr. Britton's early years at UMBC, she was lauded by both students and colleagues for her teaching and research. Dr. Gill, the chair of the sociology department, strongly supported Dr. Britton, periodically giving her a lighter teaching load to allow her to focus on research. In February 1997, Dean Welch, dean of the college of Liberal arts and sciences at UMBC, endorsed Dr. Gill's recommendation that Dr. Britton's appointment be extended for another three years.

In late 1996, Dr. Britton successfully applied for a research grant from the National Institute for drug abuse ("NIDA"). The grant was administered by the Maryland Institute for Policy analyses and research ("MIPAR"), a UMBC department headed by Dr. Norris. Dr. Norris considered Dr. Britton to be a "top notch" researcher. (J.A. at 617.)

On June 30, 1997, a few months before the award of the NIDA grant, Dr. Britton wrote to Dr. Gill requesting "overload compensation"[1] for overtime hours she claimed to have logged and for additional child care expenses. UMBC sometimes paid overload compensation, which

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[1] UMBC contends that "[w]hat dr Britton requested was not technically overload compensation for work she intended to perform in addition to her normal workload" because she asked for surplus grant funds for work already performed. (Appellee's br. at 4-5)

must be recommended by the Dean's Office and approved by the Provost, to its faculty in exchange for teaching or research performed in excess of the normal work load. In some cases, when a specific amount of a grant is budgeted for the principal investigator's (PI's) salary, the granting agency may restrict the PI from earning more than her annualized salary, even if there are surplus grant funds available.

Dr. Eckert, a full professor in UMBC's sociology department, also requested overload compensation around the same time for a long-term project he had been asked to undertake by Dr. Martello, the director of the Shriver center, an on-campus organization devoted to using academic resources to address the problems of the poor and mentally retarded. On July 9, 1997, Dr. Gill "strongly" endorsed both Dr. Britton's and Dr. Eckert's requests and submitted them to Dean Welch, in both cases noting their "extraordinary efforts in attracting research grants and contracts." (J.A. at 672.) Dr. Norris also endorsed Dr. Britton's request for additional pay.

At about the same time, the Dean's Office received several other requests for overload compensation funded by grants and other outside funding sources, requests that differed from the typical overload request, which asked for university-funded compensation for additional teaching responsibilities. As a result, Provost Argersinger ordered that all overload compensation requests, including Dr. Britton's, be tabled pending a review of UMBC's overload compensation policy. Dr. Finkelstein, Associate Dean, notified Dr. Gill in July and again in December 1997 that no overload compensation requests would be acted on until the Provost reviewed the policy. Both Dr. Gill and Dr.

Norris continued to support Dr. Britton's request for overload compensation.

Dean Welch then informed Dr. Britton that it was not possible for her to receive "'back pay' for work already conducted." (J.A. at 649.) In spite of this, Dr. Britton persisted in her request, so much so that Dean Welch discussed the issue with Provost Argersinger. Provost Argersinger suggested that UMBC offer Dr. Britton "Exceptional funded research fellow" status, which would have amounted to an award of overload pay but would have been permitted despite the freeze on overload compensation. Dr. Britton rejected this proposal because it did not give her the full amount of compensation she had requested.

While Dr. Britton's request for overload compensation was tabled, Dr. Eckert received overload compensation, although his request was not approved by the Provost. Dr. Martello and his staff at the Shriver center, unaware that Provost Argersinger had placed a freeze on overload compensation,[2] independently concluded that Dr. Eckert should be paid additional compensation by a "one pay card."[3] Dr. Martello signed three one pay cards for Dr. Eckert.

Following the denial of her request for overload compensation, Dr. Britton's relationships with UMBC administrators and faculty members began to deteriorate. In the fall of 1997, Dr. Britton learned that NIDA intended

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[2] Dr. Martello was not notified of the freeze because he is not a UMBC faculty member.

[3] One pay cards are used by UMBC to pay one-time or occasional expenses.

to cut her grant by 10%. Dr. Britton requested that UMBC make up the difference by foregoing a percentage of the grant designated for institutional overhead. Dr. Norris and Dr. Bass, Dean of the Graduate School, offered to donate a fully funded research assistant to the grant project to help make up the difference. Dr. Norris also attempted to persuade Dr. Britton to purchase cheaper computer equipment, but Dr. Britton refused.

On November 12, 1997, Dean Welch met with Dr. Britton, Dr. Norris, and Dr. Gill to discuss the 10% funding cut. The meeting was heated, with Dr. Norris speaking loudly to both Dr. Welch and Dr. Britton, and Dr. Britton, and Dr. Britton accusing Dr. Norris of gender discrimination.

Despite Dr. Britton's accusation, Dr. Norris wrote to Dean Welch three weeks later to support Dr. Britton's continued attempts to receive overload compensation. Shortly thereafter, the NIDA grant was transferred out of MIPAR. Dr. Norris felt that because his relationship with Dr. Britton was deteriorating so rapidly, MIPAR could no longer effectively administer the NIDA grant. In addition, MIPAR staff began to question Dr. Britton's veracity after she incorrectly claimed that the Dean's Office had authorized graduate students assigned to the NIDA project to work more than the maximum 20 hours per week allowed by UMBC. Around that time, one student and one anonymous source complained to NIDA that Dr. Britton engaged in scientific misconduct and misused grant funds.

At that point, Dr. Britton became more vocal with her charges, accusing other faculty members of gender discrimination and suggesting that certain faculty members solicited students to file complaints against her in

retaliation for her gender discrimination complaints. Soon thereafter, Dr. Britton filed formal complaints of discrimination with the Equal Employment Opportunity Commission (EEOC) against Dr. Norris, Dr. Gill, and various male and female faculty members in the department of sociology. Dr. Britton requested an immediate right to sue letter, which the EEOC issued on December 3, 1998, without investigating her claims.

In July 1999, the National Institutes of Health notified UMBC that it had received allegations of scientific misconduct in connection with the NIDA grant. The letter directed UMBC to undertake a formal inquiry. The committee appointed to undertake the inquiry produced a final report in September 1999, concluding that further investigation was warranted into the allegations that Dr. Britton had falsified academic credentials of grant employees, fabricated project data, misused funds, and had terminated employees in retaliation for cooperating with the investigation.

Shortly after the report was issued, Dr. Britton notified the Provost that she was withdrawing from UMBC's tenure process because of a hostile work environment; under UMBC's policies, her withdrawal would have resulted in the automatic termination of her appointment at the end of the academic year. In October 1999, Dr. Britton improperly removed research property from the NIDA project office. Dean Welch demanded the return of the grant property, but Dr. Britton refused, maintaining that NIDA instructed her not to return the property. NIDA denied making such an instruction to Dr. Britton. On November 12, 1999, UMBC terminated Dr. Britton's employment because of professional misconduct

and willful neglect of duty. Dr. Britton finally returned the research property and resigned on December 15, 1999.

On March 1, 1999, Dr. Britton filed a 78-page complaint in the United States District Court for the District of Maryland. The district court directed Dr. Britton to file a more concise complaint, and on July 14, 1999, Dr. Britton filed an amended complaint in which she asserted Title VII claims against UMBC and Section 1983 claims against Dr. Norris, Dr. Vincent, Shirley L. Bigley, and the estate of Dr. Gill. On May 22, 2000, Dr. Britton filed a second amended complaint alleging retaliation and state law claims, including claims alleging breach of contract and violation of the Maryland Declaration of Rights.

On March 31, 2003, the district court granted summary judgment to UMBC and to the individual defendants on all counts. The district court found that Dr. Britton offered "no evidence of discrimination or harassment to support any of her claims," (J.A. at 1444.), and thus failed to satisfy a prima facie case of discrimination. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (explaining what a complainant must show to establish a prima facie case of discrimination). The district court further noted that because Dr. Britton was bringing discrimination claims against the same people that had hired and promoted her, there was a strong presumption that the actions complained of were not the result of discriminatory animus. See Evans v. Techs. Applications & Serv. Co., 80 F.3d 954, 959 (4th Cir. 1996) (classifying the presumption as a "powerful inference") (internal quotation marks and citation omitted). The district court concluded that Dr. Britton had failed to overcome that presumption. Finally,

the district court found that UMBC "proffered a legitimate, non-discriminatory reason for every action it took with respect to Dr. Britton," (J.A. at 1445.), and that Dr. Britton had failed to produce evidence tending to show that those reasons were pretextual. See McDonnell Douglas Corp., 411 U.S. at 804 (explaining that claimant must show that the employer's stated legitimate reasons for the adverse action were in fact pretext).

II.

Dr. Britton appeals, challenging the order granting summary judgment against her in favor of the defendants. We review de novo the district court's grant of summary judgment, applying the same standard as did the district court. See, e.g., Howard v. Winter, 446 F.3d 559, 565 (4th Cir. 2006). "Summary judgment is appropriate when the 'pleadings, depositions, answers to interrogatories, and admissions of file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.'" Id. (quoting Fed. R. Civ. P. 56(c)).

We have reviewed the record, briefs, and applicable case law on this matter. Our careful review persuades us that the rulings of the district court were correct. Accordingly, we affirm the judgment in favor of the defendants on the reasoning of the district court. See Britton v. Univ. of Md. at Baltimore County, Civil No. L-99-588 (D. Md. March 31, 2003). We dispense with oral argument because the facts and legal conclusions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

BRANDY M. BRITTON,	:	
	:	
v.	:	CIVIL NO.
	:	L-99-588
	:	
UNIVERSITY OF MARYLAND	:	
AT BALTIMORE COUNTY,	:	
et al.	:	

ORDER

Pending is a Motion for Summary Judgment filed jointly by the University of Maryland Baltimore County, Shirley Bigley, the Estate of Derek Gill, Donald Norris, and James Vincent. For the reasons stated in the Memorandum of even date, the Court hereby (i) GRANTS Defendants' Motion for Summary Judgment, and (ii) DIRECTS the CLERK to CLOSE the CASE.

It is so ORDERED this 31st day of March, 2003.

/s/ Benson Everett Legg
Chief Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

BRANDY M. BRITTON,	:	
	:	
v.	:	CIVIL NO.
	:	L-99-588
	:	
UNIVERSITY OF MARYLAND	:	
AT BALTIMORE COUNTY,	:	
et al.	:	

MEMORANDUM

Pending is a Motion for Summary Judgment filed jointly by the University of Maryland Baltimore County, Shirley Bigley, the Estate of Derek Gill, Donald Norris, and James Vincent (collectively referred to as "Defendants"). Because counsel have extensively briefed the motions, the Court will dispense with a hearing. See Local Rule 105.6 (D. Md. 2001). For the reasons stated below the Court will, by separate order, GRANT Defendants' Motion for Summary Judgment, and DIRECT the CLERK to CLOSE the CASE.

I. BACKGROUND

This an employment discrimination case brought by a sociology professor, Brandy M. Britton, against her former employer, the University of Maryland Baltimore County ("UMBC"), and several UMBC employees. The case was filed on March 1, 1999, but has only now reached summary judgment. The case was stayed several times to

allow the plaintiff time to retain new counsel after her first and second attorneys withdrew. Additionally, discovery was extensive.

Ms. Britton's original complaint was 78 pages long. By Order dated June 29, 1999, the Court directed her to file an amended complaint that contained a short and plain statement of the facts. Plaintiff's prior counsel minimally complied with this directive and filed first and second amended complaints that contained more than 200 paragraphs of factual allegations applied to seven theories of recovery.

Plaintiff's prolix complaints are difficult to analyze. Boiled down to its essence, the plaintiff's claim is that UMBC conspired with her students and co-workers to force her to resign her position. The factual allegations are summarized below.

A. Factual Overview

On June 24, 1994, Dr. Britton accepted an offer of employment from UMBC. Dr. Britton began as an assistant professor in the UMBC department of sociology and anthropology. Pursuant to the terms of her appointment, Dr. Britton was expected to maintain a teaching load of four courses combined with "the normal commitment to scholarship [and] research." (Def. Ex. 1).

As a professor in the sociology department, Dr. Britton reported to Dr. Derek Gill, the chair of the department. Dr. Gill authorized Dr. Britton to begin her time at UMBC with a light teaching load so that she could concentrate on her research. (Def. Ex. 4).

Throughout the early years of her time at UMBC, Dr. Britton was regularly praised by students and colleagues alike. Indeed, in February 1997, the Dean of the College of Liberal Arts and Sciences endorsed Dr. Gill's recommendation that Dr. Britton's initial appointment be extended for a second three-year term, a measure which was subsequently approved. (Def. Ex. 20).

In late 1996, Dr. Britton successfully applied for a research grant from the National Institute for Drug Abuse ("NIDA").[1] Similar to other sociology research grants, the NIDA grant was administered by the Maryland Institute for Policy Analyses and Research ("MIPAR"), which is a UMBC department under the direction of Dr. Donald Norris.

On June 30, 1997, Dr. Britton wrote to Dr. Gill requesting "overload compensation." Overload compensation is occasionally paid to UMBC faculty in exchange for teaching or research performed in excess of the normal work load. In this case, Dr. Britton requested overload compensation in return for additional research hours that she claims were logged prior to her June 30th request. On July 9th, Dr. Gill endorsed Dr. Britton's request to the administration. (Def. Ex. 26). Although Dr. Britton's request was supported by Drs. Gill and Norris (Def. Ex. 26 and 32), UMBC Provost Dr. JoAnn Argersinger ordered it tabled pending a review of UMBC's overload compensation policy. Dr. Britton's request was never approved.

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[1] Dr. Britton's study was commissioned to analyze the relationship between "Woman's [*sic*] Drug Use, HIV Risk, and Interpersonal Violence." (Compl. ¶ 25).

Following her unsuccessful bid for overload compensation, Dr. Britton's relations with UMBC and certain professors began to sour. In the fall of 1997, Dr. Britton learned that NIDA planned to reduce her grant funding. On November 12th, Dr. Britton met with Dr. Norris in an attempt to encourage MIPAR to make up the funding shortfall. At this meeting, Dr. Britton felt that she was treated poorly because of her gender (Def. Ex. 40 at 1), and she subsequently accused Dr. Norris of gender discrimination.

In early 1998, the situation began to deteriorate rapidly. Beginning in January, Dr. Britton's students and employees began to lodge complaints with the university regarding her behavior. The complaints ranged from misallocation of grant monies to poor performance as a teacher. (See Opp'n at 29-32).

On April 8, 1998, Dr. Britton filed a formal complaint of gender discrimination with UMBC's human resources department. In May, UMBC hired a consultant to investigate Dr. Britton's complaints. On August 25, 1998, the consultant issued his report finding that there was probably cause to believe that UMBC personnel had (i) discriminated against Dr. Britton by denying her overload compensation and (ii) retaliated against her for pursuing her claims of gender discrimination. (Def. Ex. 75).

In response to the consultant's finding of probable cause, UMBC convened a "fact finding conference." After reviewing documents and hearing testimony, the conference chair concluded that Dr. Britton's charges were not supported by the evidence. (See Def. Ex. 77).

Following the report, UMBC took no further action regarding Dr. Britton's complaints.

By letter dated July 2, 1999, the National Institutes of Health ("NIH") advised UMBC that it had received allegations of scientific misconduct against Dr. Britton. In particular, NIH warned that Dr. Britton may have (i) falsified the credentials of several employees in her bid to secure the NIDA grant, and (ii) falsified data in a pilot study. (Def. Ex. 87). NIH directed UMBC to investigate and submit a detailed report. NIH recommended that UMBC sequester the NIDA project's data and files during the investigation. (Id. at 4). Although the files were voluminous, UMBC made arrangements to copy them as needed so that Dr. Britton could continue with her research.

In response to the NIH directive, UMBC formed a committee of inquiry. On September 28, 1999, the committee, which was comprised of three non-departmental professors, issued a report recommending that the allegations of data falsification, falsification of credentials, and misuse of grant funds be investigated further. (Def. Ex. 93).

By letter dated September 29th, Dr. Britton notified UMBC of her intent to resign "in the near future." By letter dated October 15th, UMBC ordered Dr. Britton to return equipment and materials which she had allegedly removed from the NIDA project offices. On November 12th, UMBC issued a notice of termination to Dr. Britton. After receiving the notice, Dr. Britton resigned her faculty appointment.

Following her resignation, a UMBC committee of investigation concluded that Dr. Britton had committed the following transgressions:

(i) Dr. Britton "deceptively reported her findings" in research abstracts (Def. Ex. 115 at 20);

(ii) Dr. Britton improperly attempted to terminate a NIDA project employee, Lisa Gardner, because Dr. Britton believed that Ms. Gardner had initiated the complaints of scientific misconduct (id, at 23);

(iii) Dr. Britton concealed information from the UMBC investigation of her alleged scientific misconduct (id, at 24); and

(iv) Dr. Britton falsified the credentials of her staff when applying for the NIDA grant (id, at 29).

Dr. Britton's administrative appeal of the committee's conclusions was subsequently denied.

B. Plaintiff's Claims

Dr. Britton's second amended complaint contains dozens of factual allegations, most of which are not cognizable in a federal court. Title VII does not allow a plaintiff to sue merely because she is dissatisfied with work assignments and working conditions. See Carter v. Ball, 33 F.3d 450, 459 (4th Cir. 1994). Rather, the employment decision that forms the basis of a complaint must have a tangible effect on the plaintiff's terms, conditions, or

privileges of employment. Most of Dr. Britton's claims do not meet this threshold requirement. For example, Dr. Britton does not argue that she suffered tangible harm when Dr. Gill allegedly credited his paramour for work that Dr. Britton had completed (Second Am. Compl. at¶¶ 61-64). That claim, like most of Dr. Britton's allegations, deserves no further attention.

After weeding out the complaints which are not cognizable, Dr. Britton's claims can be separated into the following categories:

(i) regarding overload compensation, Dr. Britton contends that she was denied overload compensation when a comparably-situated male, Dr. Kevin Eckert, had his request approved.

(ii) regarding the administration of her grant, Dr. Britton alleges that Defendants undermined her authority and eventually transferred the administration of the grant in an effort to retaliate against her for her claims of gender discrimination; and

(iii) regarding the disciplinary process leading to her resignation, Dr. Britton claims that Defendants orchestrated the complaints against her, which were lodged with both UMBC and NIH.

Further complicating the analysis are the wide-variety of legal theories raised by Dr. Britton. In her seven-count complaint, Dr. Britton argues that Defendants are liable for (i) violations of Articles 19 and 24 of the

Maryland Declaration of Rights; (ii) breach of contract; (iii) tortuous interference with her business relations and contract with NIA; and (iv) violations of Title VII and 42 U.S.C.§ 1983. The Court will address each theory of recovery in turn.

II. STANDARD FOR SUMMARY JUDGMENT

The Court may grant summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions of file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); see also Felty v. Granves-Humphreys Co., 818 F.2d 1126, 1128 (4th Cir. 1987) (recognizing that trial judges have "an affirmative obligation" to prevent factually unsupported claims and defenses from proceeding to trial). Nevertheless, in determining whether there is a genuine issue of material fact, the Court views the facts, and all reasonable inferences to be drawn from them, in the light most favorable to the non-moving party. Pulliam Inv. Co. v. Cameo Properties, 810 F.2d 1282, 1286 (4th Cir. 1987).

III. ANALYSIS

A. Maryland Constitutional Claims

Dr. Britton has alleged violations of Articles 19 and 24 of the Maryland Declaration of Rights. These articles are the Maryland equivalents of the due process guarantees contained in the Fifth and Fourteenth Amendments to the United States Constitution. At no pint in Dr. Britton's complaint or opposition to the motion to

dismiss does she state the basis for her claim that she was denied due process. The crux of her grievance is gender discrimination, and Title VII is the proper vehicle to address her complaints. Accordingly, this claim is dismissed.

B. Breach of Contract

Dr. Britton claims that a contract was violated when UMBC "conduct[ed] investigations in violation of the terms of said contract rights." Second Am. Compl. ¶250). The plaintiff fails to identify the contract to which she is referring. Defendants argue that Dr. Britton has not offered any evidence of an agreement, oral or written, that pertains to UMBC investigations. In her opposition, Dr. Britton does not respond to this argument, nor does she offer any facts that would tend to support her breach of contract claim. Because the plaintiff has apparently abandoned this cause of action, the Court dismisses this claim.

C. Tortious Interference with a Contract and Business Relations

In Counts V and VI, Dr. Britton contends that Defendants interfered with her contract and business relations with NIDA. Specifically, she contends that Defendants solicited and encouraged complaints about her research methods and her use of NIDA grants funds.

Defendants argue that (i) UMBC is immune from these causes of action under the Eleventh Amendment, and (ii) the individual defendants are entitled to qualified immunity from these state torts under the Maryland Tort Claims Act. Dr. Britton can prevail against the qualified

immunity defense if she can show that the individual defendants acted with malice or gross negligence.[2] See Md. Code Ann., Cts. & Jud. Proc. §5-522(b) (2002).

Dr. Britton does not respond to Defendants' immunity argument. That argument, therefore, stands unrebutted. Moreover, none of the facts produced by Dr. Britton would support a finding of liability under these claims, much less the finding of malice or gross negligence necessary to overcome the qualified immunity defense. Accordingly, the Court dismisses Dr. Britton's claims of tortuous interference with a contract and with business relations.

D. Title VII and §1983 Claims

The familiar burden-shifting standard that the Supreme Court set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), applies to Dr. Britton's Title VII claims: if the plaintiff establishes a prima facie case, the burden of production shifts to the defendant to articulate a legitimate nondiscriminatory reason for its actions. If the defendant provides such a reason, the plaintiff must then demonstrate that the proffered reason was a pretext. See Gillins v. Berkeley Electric Cooperative, Inc., 148 F.3d 413 (4th Cir. 1998). Although the burden of production shifts, the plaintiff retains the burden of persuasion throughout all the stages of proof. See Burns v. AAF-McQuay, Inc., 96 F.3d 728, 731 (4th Cir. 1996). Failure to produce evidence of an element of the

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[2] The Maryland Tort Claims Act stops short of granting individual state employees immunity for actions taken with malice or gross-negligence "in order to advance the twin goals of protecting State personnel but deterring lawless conduct by them." Lee v. Cline, 149 Md. App. 38, 82 (2002).

Title VII prima facie case is also fatal to a plaintiff's claims under § 1983. See Causey v. Balog, 162 F.3d 795, 804 (4th Cir. 1998).

As the McDonnell Douglas Court recognized, different formulations of the prima facie burden will be required for different factual situations. McDonnell Douglas Corp. v. Green, 411 U.S. at 802 n. 13. Regardless of the prima facie burdens presented by Dr. Britton's myriad of claims, the Court is satisfied that she has not met her burden.

As Defendants painstakingly demonstrate in their 125-page memorandum for summary judgment, Dr. Britton has come forward with no evidence of discrimination or harassment to support any of her claims. She offers neither affidavits nor deposition testimony from any person associated with UMBC. Rather, her claims are based on unsupported inferences drawn from the exhibits attached to Defendants' motion to dismiss. For example, Dr. Britton argues that UMBC's decision not to award her overload pay must have been motivated by discriminatory animus because Dr. Eckert's request for overload compensation was approved. Dr. Britton has not, however, produced evidence that she was comparable situated to Dr. Eckles[*sic*].[3] Moreover, Dr. Britton has not proffered any evidence tending to rebut UMBC's legitimate, non-discriminatory explanation for the

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[3] Defendants argue that, even before Provost Argersinger suspended overload compensation payments, Dr. Britton's request would not have been approved because, pursuant to UMBC policy, overload pay requests had to be submitted before any work was done. Dr. Britton's request was connected to research that she had already completed. She is not, therefore, comparably situated to Dr. Eckert, whose request fell within UMBC guidelines. (See Def. Mem. At 79-82).

approval of Dr. Eckert's request, namely that it was an administrative mistake which UMBC subsequently corrected through deductions to his paycheck. (Def. Ex. 36). Plaintiff's claims regarding the administration of her grant and the disciplinary process fall prey to the same evidentiary defects presented by her claim of overload compensation.

Furthermore, the discriminatory acts about which Dr. Britton complains were allegedly perpetrated by the same faculty members who hired her, secured her three-year contract extension, and supported her request for overload compensation.[4] When a decision maker accused of discrimination has previously hired or promoted the employee, there is a strong presumption that the decision complained of was not the result of discriminatory animus. Evans v. Techs. Applications & Serv. Co., 80 F.3d 954, 959 (4th Cir. 1996). Dr. Britton does not overcome this presumption.

Finally, UMBC has proffered a legitimate, non-discriminatory reason for every action it took with respect to Dr. Britton. Dr. Britton, however, has not produced evidence tending to show that these reasons are pretextual. At most, she points to the probably cause determination made by the outside consultant hired by UMBC. His report, however, is entitled to no weight in a judicial proceeding because it is a lay person's opinion about the

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[4] The majority of Dr. Britton's claims arise from acts allegedly performed by Drs. Gill and Norris. In addition to those defendants, Dr. Britton sued Dr. James Vincent and University Counsel Shirley Bigley. In essence, Dr. Britton argues that Dr. Vincent and Ms. Bigley each played a minor role in the Defendants' alleged conspiracy to force her to resign. The Court, however, has focused on Drs. Gill and Norris, who are indisputably the main players in the alleged conspiracy.

inferences to be drawn from the evidence. This Court is obligated to consider the evidence independently, and the Court is satisfied that no rational jury could conclude that UMBC's non-discriminatory reasons are pretextual.

The Court is satisfied that no reasonable fact finder could conclude that Dr. Britton was the victim of gender discrimination or a hostile work environment. Accordingly, summary judgment will be entered for Defendants.

IV. CONCLUSION

For the reasons stated herein, the Court will by separate Order, GRANT Defendants' Motion for Summary Judgment and DIRECT the CLERK to CLOSE the CASE.

Dated this 31st day of March, 2003.

/s/ Benson Everett Legg
Chief Judge

(2)

FILED
FEB 2 3 2007
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SUPREME COURT, U.S.

No. 06-1030

IN THE
Supreme Court of the United States

BRANDY M. BRITTON,
Petitioner,

v.

UNIVERSITY OF MARYLAND,
BALTIMORE COUNTY, *et al.*,
Respondents.

On Petition For A Writ Of Certiorari
To the United States Court Of Appeals
For the Fourth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the court of appeals correctly affirm the district court's entry of summary judgment denying a female professor's claims of gender discrimination in violation of Title VII and 42 U.S.C. § 1983 where the plaintiff failed to meet her burden to establish a *prima facie* case of discrimination based on gender, the employer demonstrated legitimate, non-discriminatory reasons for every one of its actions, and the employee presented no evidence of pretext and, instead, relied solely on unsupported inferences and suppositions that are insufficient as a matter of law to generate a triable issue of fact?

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STATEMENT OF THE CASE

Petitioner Brandy Britton brought suit against her former employer, the University of Maryland, Baltimore County ("UMBC") and various faculty and administrators of the university, alleging discrimination based on gender in violation of Title VII and 42 U.S.C. § 1983. In an unreported opinion, the district court granted summary judgment in favor of all defendants on all claims. App. 7-8. The circuit court affirmed in an unreported *per curiam* opinion. App. 8-9. On January 27, 2007, four days after her petition for *certiorari* was filed in this Court, Dr. Britton died. At this time, no representative has been substituted as a petitioner pursuant to Supreme Court Rule 35.1.

Dr. Britton was hired as an assistant professor in June 1994 by Dr. Derek Gill, then the chair of UMBC's sociology department. App. 2, 12. In her first several years at UMBC, Dr. Britton was well liked and respected by her colleagues and students and was, in fact, given preferential treatment because of her ability to procure research funding. For instance, Dr. Britton was permitted to carry a lighter teaching load so she could focus on her research. App. 2, 12-13. Though Dean Rickey Welch was concerned that Dr. Britton had not published in her first several years at UMBC, he endorsed Dr. Gill's recommendation to extend Dr. Britton's faculty appointment. App. 2, 13.

Problems first began in June 1997, when Dr. Britton sought to use surplus grant funds for retroactive payment of overtime and child care expenses she had incurred while working on a research project. App. 2, 13. Dr. Britton submitted a request for "overload compensation," which UMBC defined as a sum over and above a faculty member's annualized salary paid contemporaneously or prospectively for additional

teaching or work on special projects. App. 2-3, 13. At the same time, Dr. Kevin Eckert, a male professor, also sought approval for payment of overload compensation for a long term project he had been asked to undertake on behalf of the Shriver Center, an independent organization located on UMBC's campus. App. 3. Though the money sought by Dr. Britton was not technically overload compensation, Dr. Gill endorsed her request and submitted it for approval, along with that of the male faculty member, noting the "extraordinary efforts" of both. App. 3, 13.

Dr. Britton's request for overload compensation was never approved. An unusually high number of requests for overload compensation payable from outside funding sources prompted UMBC to place a temporary freeze on payment of overload compensation. App. 3, 13. As the result of a mistake, Dr. Eckert initially was paid for work he performed for the Shriver Center, despite the freeze, but the funds were subsequently deducted from his salary. App. 4, 21-22.

In September 1997, Dr. Britton was named as the Principal Investigator on a research project funded by a $1.7 million grant from the National Institute for Drug Abuse ("NIDA"). App. 2, 13. After learning that NIDA intended to cut the grant by 10%, Dr. Britton insisted that UMBC make up the difference by forgoing the portion of the grant reserved for UMBC's overhead. App. 4-5. UMBC declined, but offered to donate the services of a fully funded research assistant to the project. App. 5. Dr. Donald Norris, who administered the grant through UMBC's Maryland Institute for Policy Analysis and Research ("MIPAR"), tried to persuade Dr. Britton to conserve grant funds by purchasing cheaper computer equipment, an idea that Dr. Britton rejected, causing

friction between the two of them. App. 5.

Dr. Britton met with Dean Welch, Dr. Gill, and Dr. Norris to address the NIDA grant funding cut. App. 5, 14. The meeting became heated when Dr. Norris again urged Dr. Britton to buy cheaper computers. App. 5. Dr. Norris raised his voice and Dr. Britton accused him of treating her rudely because she was a woman. App. 5, 14. Several weeks later, after relations between Dr. Britton and Dr. Norris continued to deteriorate, Dr. Norris felt he could no longer effectively administer the NIDA grant and transferred it out of MIPAR. App. 5. Nevertheless, Dr. Norris wrote to Dean Welch supporting Dr. Britton's efforts to obtain overload compensation. App. 5.

In late 1997 and early 1998, as work began on the NIDA project, grant employees and graduate students assigned to the project began to complain to other faculty about working conditions under Dr. Britton. App. 5, 14. Other students began to lodge complaints about Dr. Britton's inattention to faculty duties which, in some cases, delayed students' thesis work and timely completion of their degrees. App. 14. One student and one anonymous source submitted written complaints to NIDA accusing Dr. Britton of scientific misconduct and misuse of grant funds. App. 5.

By April 1998, Dr. Britton had filed formal gender discrimination claims against Dr. Gill, Dr. Norris, and other faculty members in the Sociology Department, both male and female. App. 6, 14. Dr. Britton also accused UMBC faculty and administrators of soliciting students to file complaints against her in retaliation for her claims of gender discrimination. App. 5-6. Dr. Britton's claims of gender discrimination were referred to an outside consultant who, after an extensive investigation,

determined that Dr. Britton had failed to present evidence of actionable gender discrimination. App. 14-15.

In July 1999, the Office of Research Integrity ("ORI") of the National Institutes of Health directed UMBC to conduct an investigation into allegations of scientific misconduct by Dr. Britton and to sequester all of the NIDA project files. App. 6, 15. In September 1999, a Committee of Inquiry appointed by UMBC recommended a formal investigation into allegations that Dr. Britton had falsified academic credentials of grant employees, fabricated project data, misused project funds, and terminated a grant employee in retaliation for cooperating with the scientific misconduct investigation. UMBC appointed a Committee of Investigation to conduct the scientific misconduct investigation. App. 6, 15.

Shortly afterward, Dr. Britton withdrew from the tenure process, claiming she was the victim of a hostile work environment. App. 6, 15. Dr. Britton was notified that her withdrawal would result in the automatic termination of her faculty appointment at the end of that academic year. App. 6. A month later, ignoring the fact that the project was subject to a federal scientific misconduct investigation, Dr. Britton removed equipment and materials from the NIDA project office, including data files overlooked in the sequestration process, the project checkbook, keys to the filing cabinet in which data files were kept, and a computer CPU containing project data. App. 6, 15. After being notified that she would be terminated for professional misconduct and willful neglect of duty, Dr. Britton resigned her faculty appointment in December 1998. App. 6-7, 15.

In November 1999, the Committee of Investigation

issued its final report, concluding that Dr. Britton had engaged in scientific misconduct under UMBC's policies. App. 6. The report was submitted to ORI, which ultimately concluded that, under federal regulations, the evidence was insufficient to warrant a finding of scientific misconduct by Dr. Britton.

In its unreported opinion, the district court distilled Dr. Britton's numerous allegations into three claims of gender discrimination: 1) she was denied overload compensation though a male faculty member's request was approved; 2) Dr. Norris transferred her grant out of MIPAR in retaliation for her allegations of gender discrimination; and 3) UMBC faculty and administrators conspired to orchestrate complaints filed with UMBC and ORI. App. 17.

The district court, applying the burden-shifting scheme in *McDonnell Douglas v. Green*, 411 U.S. 792, 802 (1973), determined that Dr. Britton failed to meet her burden to establish a *prima facie* case of discrimination based on gender because she failed to put forth any evidence of discrimination or harassment and, instead, relied solely on "unsupported inferences. . . ." App. 7-21. Moreover, UMBC demonstrated legitimate, non-discriminatory reasons for every action taken involving Dr. Britton, who failed to point to any evidence to show those reasons were mere pretexts for discrimination based on gender. App. 8, 21-22.

The district court also noted that the majority of Dr. Britton's claims were against Drs. Gill and Norris, who had either hired her, supported her quest for additional compensation, or recommended the extension of her three-year faculty appointment. App. 7, 22.

Thus, in the absence of any evidence showing discriminatory animus, Dr. Britton could not overcome the "same-actor" inference. *See Evans v. Technologies Appl. & Serv. Co.*, 80 F.3d 954, 959 (4th Cir. 1996) (inference that same persons who hired and promoted employee did not act with discriminatory animus). App. 8, 22.

The circuit court affirmed the decision of the district court in an unreported *per curiam* opinion, for the reasons stated by the district court, which the circuit court concluded were correct. App. 7-9.

REASONS FOR DENYING THE WRIT

THE PETITION DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

As a preliminary matter, the Petitioner died on January 27, 2007, four days after filing the petition. No motion has been made to substitute an authorized representative of the deceased Petitioner pursuant to Rule 35.1 of the Supreme Court Rules. *See id.* ("If the substitution of a representative of the deceased is not made within six months after the death of a party, the case shall abate.").

Further review of this case is unwarranted because both unpublished decisions below rest on a fact-specific determination that conforms with prior decisions of this Court and does not conflict with the decision of another United States Court of Appeals. Both courts below concluded that the Petitioner failed to meet her burden of establishing a *prima facie* case of discrimination based on gender and, instead, relied only on unsupported inferences insufficient to generate a triable issue of fact.

App. 7. While both lower courts determined that the employer demonstrated legitimate, non-discriminatory reasons for every one of its actions, the Petitioner presented no evidence sufficient either to rebut those reasons or to show that they were pretextual. App. 7-8.

Petitioner seeks review solely on the basis of the lower courts' application of the "same actor" inference, which permits an inference that the same individuals who hired or promoted an employee did not subsequently act with discriminatory animus. *See Evans v. Technologies Appl. & Serv. Co.*, 80 F.3d 954, 959 (4th Cir. 1996). Every federal circuit has applied some variation of the "same actor" inference, though recognizing that the inference can be overcome by evidence put forth by the plaintiff. *See, e.g., Antonio v. Sygma Network, Inc.*, 458 F.3d 1177, 1183 (10th Cir. 2006) (adopting "same actor" inference and recognizing application "by varying degrees" by 1st, 2d, 3rd, 4th, 6th, 7th, 8th, 9th, and 11th circuits) (internal citations omitted); *Waterhouse v. Dist. of Columbia*, 124 F. Supp.2d 1, 12-13 (D.D.C. 2000), *aff'd*, 298 F.3d 989, 996 (D.C.C. 2002) (applying inference and recognizing application in 2d, 4th, 5th, 6th, 7th, 9th, and 11th circuits) (internal citations omitted).

There is no basis for Petitioner's suggestion that the "same actor" inference is precluded by this Court's decision in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000) (holding that a plaintiff's *prima facie* case, coupled with evidence that an employer's stated reason for its actions is false or pretextual, is sufficient to withstand an employer's motion for summary judgment). *Id.* at 120. No federal court has held that *Reeves* precludes use of the "same actor" inference. *Reeves* has no application here because both lower courts concluded that the Petitioner not only failed to make out

a *prima facie* case of discrimination, but also failed to put forth any evidence of pretext. App. 7-8, 21-22. Thus, it was the complete dearth of evidence showing discrimination, not merely the "same actor" inference, that warranted summary judgment here. Accordingly, this case presents a poor vehicle for consideration of the legal questions posed in the petition, since resolution of those issues is unlikely to alter the outcome in this case.

CONCLUSION

For the reasons stated, the petition should be denied.

Respectfully submitted,

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